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September 15, 1993

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

Re: MM Docket No. 93-178  
Howard B. Dolgoff  
(File No. BPH-911223ME)

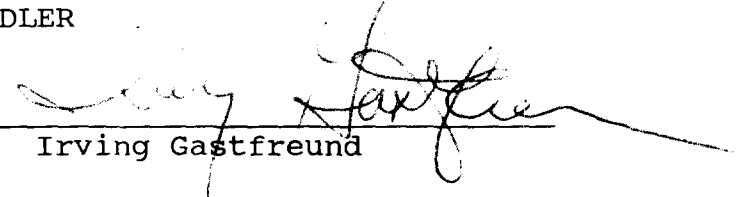
Dear Mr. Caton:

Submitted herewith for filing, on behalf of our client, Howard B. Dolgoff, an applicant in the above-referenced comparative hearing proceeding (MM Docket No. 93-178), are an original and six (6) copies of his Petition For Leave To File Interlocutory Appeal in the proceeding. Kindly refer this submission to Administrative Law Judge John M. Frysiak.

Please direct any inquiries concerning this submission to the undersigned.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS &  
HANDLER

By:   
Irving Gastfreund

Enclosures

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BEFORE THE

**Federal Communications Commission**

SEP 15 1993

WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of

HOWARD B. DOLGOFF and

MARK AND RENEE CARTER

For a Construction Permit For a  
New FM Radio Station on Channel  
292A in Miramar Beach, FloridaMM Docket No. 93-178

File No. BPH-911223ME

File No. BPH-911224MD

TO: Administrative Law Judge John M. FrysiakPETITION FOR LEAVE TO FILE INTERLOCUTORY APPEAL

HOWARD B. DOLGOFF ("Dolgoff"), by his attorneys, pursuant to Section 1.301(b) of the Commission's Rules, hereby seeks leave to file an interlocutory appeal with respect to the Presiding Judge's Memorandum Opinion and Order, FCC 93M-575 (ALJ released September 10, 1993) (hereinafter "Ruling"). In support whereof, it is shown as follows:

In his Ruling, the Presiding Judge denied Dolgoff's August 10, 1993 Petition To Enlarge Issues, as modified on August 11, 1993. In essence, the Presiding Judge held that Dolgoff had failed to establish the existence of a substantial and material question of fact warranting evidentiary inquiry as to whether Mark and Renee Carter (the "Carters") had engaged in site misrepresentation or lack of candor as to site, or in misrepresentation of financial qualifications, or in abuse of process.

Df

In denying the requested site misrepresentation/lack of candor issues, the Presiding Judge concluded that Dolgoff's allegations were "speculative" and suggested that the showings made by Dolgoff were not supported by any affidavit or declaration. Ruling at ¶4. Conclusions are at odds with the facts. Although the Ruling recites that the Presiding Judge considered Dolgoff's September 1, 1993 Reply To Opposition To Petition To Enlarge Issues, the conclusions reached in Paragraph 4 of the Ruling indicate that the Presiding Judge may not have considered the August 27, 1993 Declaration of Howard B. Dolgoff, submitted as Exhibit 4 to Dolgoff's Reply To Opposition To Petition To Enlarge Issues. In that Declaration, Mr. Dolgoff establishes beyond doubt that no "meeting of the minds" of any sort with respect to site availability occurred until several months after the Carters' application was filed. The fact that the Presiding Judge concluded that Dolgoff's showings were unsupported by affidavit appears to suggest that the Presiding Judge may have overlooked Dolgoff's Declaration.

With respect to the Presiding Judge's denial of a financial misrepresentation/lack of candor issue, the Presiding Judge merely dismissed Dolgoff's contentions at pages 10 - 19 of his Reply To Opposition To Petition To Enlarge Issues by the conclusion that Dolgoff's contentions were merely "a quibble". No reasoned determination was provided for the refusal to specify an issue in light of the precedent cited by Dolgoff in his

Petition To Enlarge Issues and in his Reply To Opposition To  
Petition To Enlarge Issues.

Similarly, the Presiding Judge's refusal to specify an abuse of process issue was not a reasoned determination that specifically came to grips with the argument and precedent cited by Dolgoff in his Petition To Enlarge Issues and in his Reply To Opposition To Petition To Enlarge Issues. In Paragraph 8 of the Ruling, the Presiding Judge merely concluded that "no harm was done" because the Carters withdrew their request for specification against Dolgoff of a site availability issue. However, the Presiding Judge failed to resolve the other claims and showings and precedent cited by Dolgoff in his Petition and in his Reply in connection with the requested abuse of process issue.

In light of all the foregoing, an interlocutory appeal in this case would present a new or novel question of law or policy -- i.e., whether the showings made by Dolgoff are insufficient, as a matter of law, to constitute a demonstration of the existence of a substantial and material question of fact warranting evidentiary inquiry, under SEction 309 of the Communications Act and Section 1.229 of the Commission's Rules. Plainly, error by the Presiding Judge on this issue would be likely to require remand should the appeal be deferred and raised

as an exception, since the issues requested by Dolgoff are character qualifications issues.

In light of the foregoing, an interlocutory appeal should be allowed by the Presiding Judge, or, in the alternative, it is respectfully requested that the Presiding Judge modify his Ruling by specifying the issues requested by Dolgoff.

Respectfully submitted,

HOWARD B. DOLGOFF

By: 

Irving Gastfreund

Kaye, Scholer, Fierman, Hays &  
Handler  
The McPherson Building  
901 15th Street, N.W., Suite 1100  
Washington, D.C. 20005

His Attorneys

September 15, 1993

CERTIFICATE OF SERVICE


I, Mary Odder, a secretary with the law firm of Kaye, Scholer, Fierman, Hays & Handler, hereby certify that on this 15th day of September 1993, have caused a copy of the foregoing Petition For Leave To File Interlocutory Appeal be hand-delivered or to be sent via first-class United States mail, postage prepaid, to the following:

Honorable John M. Frysiak\*  
Administrative Law Judge  
Federal Communications Commission  
2000 L Street, N.W.  
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Counsel for Mark and Renee Carter

  
Mary Odder

\*/ Via Hand-Delivery